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NOTES

THE AUTOMATIC COMPANION RULE: AN APPROPRIATE STANDARD TO JUSTIFY THE *TERRY* FRISK OF AN ARRESTEE'S COMPANION?

INTRODUCTION

The Supreme Court has said " 'no right is held more sacred, or is more carefully guarded' " than the fourth amendment's proscription against unreasonable searches and seizures.¹ Therefore, searches and seizures generally must be supported by probable cause² to prevent arbitrary and discriminatory police action.³

The Supreme Court recognized an exception to the probable cause requirement in *Terry v. Ohio*.⁴ It noted that certain encounters between police and the public do not comport with traditional arrest situations⁵

1. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (" 'The security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment.' " (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), overruled on other grounds, 367 U.S. 643 (1961))).

The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. States must comply with the provisions of the fourth amendment pursuant to the fourteenth amendment. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

2. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 227-29 (1983) (search warrant requires probable cause); *Draper v. United States*, 358 U.S. 307, 310 (1959) (probable cause necessary for arrest). For a definition of probable cause, see *infra* notes 22-23 and accompanying text.

3. This sort of police action provided the historical basis for the probable cause requirement. See *Henry v. United States*, 361 U.S. 98, 100 (1959) ("The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance . . . both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion." (footnote omitted)). Thus, prior to *Terry*, all searches and seizures, whether made pursuant to a warrant or not, had to be based on probable cause. See *Dunaway v. New York*, 442 U.S. 200, 207-08 (1979); *Terry v. Ohio*, 392 U.S. 1, 20 (1968); see, e.g., *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) (search warrant must be based on probable cause); *Ker v. California*, 374 U.S. 23, 34-35 (1963) (warrantless arrest and search incident thereto must be based on probable cause).

4. 392 U.S. 1, 27 (1968); see *United States v. Place*, 462 U.S. 696, 702 (1983); *Michigan v. Summers*, 452 U.S. 692, 698 (1981).

5. "An arrest is the initial stage of a criminal prosecution. . . . [A] perfectly reasonable apprehension of danger may [nonetheless] arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime." *Terry v. Ohio*, 392 U.S. 1, 26-27 (1968); see, e.g., *Michigan v. Long*, 463 U.S. 1032, 1051 (1983) (police may search passenger compartment of car where reasonable suspicion of danger exists); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (per curiam) (officer effecting lawful traffic detention may ask driver to step out of car without violating reasonableness requirement of fourth amendment).

and, therefore, should be evaluated under the fourth amendment's general proscription against unreasonable searches and seizures.⁶ Thus, under *Terry* a police officer may "stop"⁷ a person manifesting criminal behavior⁸ and "frisk"⁹ that person if the officer reasonably believes that person is armed and dangerous.¹⁰

Subsequent applications of the *Terry* standard to a "stop and frisk"¹¹ of an arrestee's companion have created confusion among the courts of appeals.¹² In *United States v. Berryhill*,¹³ the Court of Appeals for the Ninth Circuit established the "automatic companion"¹⁴ rule, a bright-line standard that approves virtually any frisk of an arrestee's companion.¹⁵ Some courts either adopt or approve of the rule¹⁶ while others refuse to accept it, questioning its constitutionality.¹⁷ The courts that refuse to accept the rule interpret *Terry* to require an examination of the

6. U.S. Const. amend. IV. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Prior to *Terry*, the reasonableness of a search or seizure was determined only upon a showing of probable cause. In *Terry*, the Court for the first time recognized an exception to the probable cause requirement applicable to certain police activity less intrusive than a full search and arrest. See *id.* To justify this exception, the Court distinguished between the warrant clause of the fourth amendment and the general proscription against unreasonable searches and seizures. See *id.*; *Dunaway v. New York*, 442 U.S. 200, 208-10 (1979).

7. *Terry*, 392 U.S. at 10.

8. *Id.* at 30.

9. *Id.* at 10.

10. *Id.* at 30. For a discussion of the scope of probable cause and reasonable suspicion see *infra* notes 21-37 and accompanying text.

11. A stop and frisk is an on-the-street stop, interrogation and "pat-down" of a person for weapons. *Id.* at 12.

12. Compare *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971) (companion of arrestee may automatically be frisked for weapons) with *United States v. Bell*, 762 F.2d 495, 499 (6th Cir.) (police must have reasonable suspicion that arrestee's companion is armed before frisking), *cert. denied*, 474 U.S. 853 (1985).

13. 445 F.2d 1189 (9th Cir. 1971).

14. *United States v. Bell*, 762 F.2d 495, 498 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985).

15. See *Berryhill*, 445 F.2d at 1193. The Court of Appeals for the Ninth Circuit applied this bright-line rule again in *United States v. Vaughan*, 718 F.2d 332, 334-35 (9th Cir. 1983), although the court did not cite *Berryhill*.

16. See *United States v. Simmons*, 567 F.2d 314, 318-19 (7th Cir. 1977) (citing *Berryhill* with approval); *United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973) (*per curiam*) (extending *Berryhill*'s bright-line rule to companion who arrives during the arrest); see also *United States v. Vaughan*, 718 F.2d 332, 334-35 (9th Cir. 1983) (applying automatic companion rule without citing to *Berryhill*).

A number of state courts apply the automatic companion rule as well. See, e.g., *State v. Clevidence*, 153 Ariz. 295, 299, 736 P.2d 379, 382 (1987); *Lewis v. United States*, 399 A.2d 559, 561-62 (D.C. 1979); *People v. Evans*, 22 Ill. App. 3d 733, 735-36, 317 N.E.2d 734, 735-36 (1974); *State v. Dougherty*, 493 P.2d 1383, 1385 (Or. App. 1972); *Commonwealth v. Hook*, 313 Pa. Super. 1, 18-19, 459 A.2d 379, 388-89 (1983); *State v. Flynn*, 92 Wis. 2d 427, 435-36, 285 N.W.2d 710, 714 (1979), *cert. denied*, 449 U.S. 846 (1980).

17. See *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 498 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); see also *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (*en banc*) (in dictum, court indicated it would not follow automatic companion rule), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987).

"totality of the circumstances"¹⁸ of a stop and frisk, including, but not limited to, companionship.¹⁹

This Note addresses whether the automatic companion rule constitutes an appropriate bright-line standard for a stop and frisk for weapons of an arrestee's companion. Part I discusses the fourth amendment's requirement of probable cause and the exception to that requirement created by the Supreme Court in *Terry v. Ohio* with regard to a stop and a protective frisk for weapons. Part II examines the subsequent difference of opinion among the courts of appeals in applying the *Terry* standard to the frisking of an arrestee's companion and argues that the automatic companion rule does not meet the Supreme Court's reasonable suspicion requirement set out in *Terry v. Ohio* and *Ybarra v. Illinois*.²⁰ Part II also determines that this area mandates case-by-case adjudication, showing that a search of an arrestee's companion is an inappropriate circumstance in which to draw a bright-line rule. This Note concludes that courts should not adopt the automatic companion rule because it constitutes an inappropriate extension of the *Terry* exception to the probable cause requirement.

I. FOURTH AMENDMENT

A. Probable Cause

The fourth amendment provides that a search or arrest be conducted pursuant to a warrant issued only upon a finding of probable cause.²¹ Supreme Court jurisprudence defines probable cause in the context of a search warrant as a "'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing,"²² and, in the context of an arrest warrant as facts and circumstances known to the officer that "'warrant a man of reasonable caution in the belief that' an offense has been or is being committed."²³ The probable cause requirement repre-

18. *Flett*, 806 F.2d at 827; *Bell*, 762 F.2d at 499; *United States v. Clay*, 640 F.2d 157, 159 (8th Cir. 1981); *Tharpe*, 536 F.2d at 1100.

19. See *Flett*, 806 F.2d at 827; *Bell*, 762 F.2d at 501; *Tharpe*, 536 F.2d at 1100. For example, in *Bell*, the court considered the location of the arrest, the nature of the crime for which the arrestee was wanted, and the companion's conduct during the arrest. See 762 F.2d at 500-02.

20. 444 U.S. 85 (1979).

21. See U.S. Const. amend. IV.

22. *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960), *overruled on other grounds*, 448 U.S. 83 (1980)).

23. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

Generally, probable cause to search and to arrest requires the same quantum of evidence; it is the focus of the inquiry that differs. For a search warrant, the inquiry focuses on the existence and location of incriminating items; for an arrest warrant, the focus is on the guilt of the arrestee. See 1 W. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.1(b), at 544-45 (2d ed. 1987). See generally Y. Kamisar, W. LaFare, & J. Israel, *Modern Criminal Procedure* 279-80 (6th ed. 1986) (discussion of probable cause determination).

sents a compromise between the government's interest in providing effective law enforcement and citizens' interests in being safeguarded from arbitrary and unreasonable invasions of their privacy.²⁴ Although probable cause is based upon reasonable belief,²⁵ it must go beyond mere suspicion,²⁶ and it must be determined by the factual circumstances of each case.²⁷

B. *Exceptions to Probable Cause: Terry v. Ohio*

The Supreme Court has interpreted the fourth amendment's general proscription against unreasonable searches and seizures²⁸ to permit certain searches²⁹ and seizures that are not conducted pursuant to a warrant or based on probable cause.³⁰ Traditionally, probable cause embodied the absolute standard for all fourth amendment encounters.³¹ In *Terry v. Ohio*,³² however, the Supreme Court created a limited exception to this rule, holding that a police officer, in appropriate circumstances and in an appropriate manner,³³ may stop a person to investigate possibly criminal behavior, even though no probable cause exists to make an arrest.³⁴ If the officer reasonably suspects that the person he has stopped is armed and dangerous, he may "conduct a carefully limited search of the outer clothing . . . in an attempt to discover weapons which may be used to assault him."³⁵ The Court established a general reasonableness stan-

24. See *Dunaway v. New York*, 442 U.S. 200, 208 (1979); *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

25. "The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'" *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 161 (1925)).

26. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *Henry v. United States*, 361 U.S. 98, 101 (1959).

27. See *Wong Sun*, 371 U.S. at 479. The Court has acknowledged that the inherent uncertainty of confrontational situations may cause mistakes to be made, but it posited that mistakes are permitted if they are "those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

28. See U.S. Const. amend. IV.

29. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1051 (1983) (police may search passenger compartment of car where reasonable suspicion of danger exists); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (protective weapons search requires only reasonable suspicion that person is armed and dangerous).

30. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (per curiam) (officer effecting lawful traffic detention may ask driver to step out of car).

31. See *Dunaway v. New York*, 442 U.S. 200, 207-08 (1979).

32. 392 U.S. 1 (1968).

33. *Id.* at 22.

34. *Id.* at 27. In *Terry*, a veteran police officer observed three men "casing" an establishment in a downtown area in mid-afternoon. He observed them walking up and down the street alternately, approximately twelve times, each time peering into the same window. *Id.* at 6. He approached them, identified himself, and asked their names. See *id.* at 6-7.

35. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). When the three men did not respond to questions beyond mumbling, the officer frisked Terry for weapons. *Id.* at 7. Feeling what he believed to be a weapon, he retrieved a pistol from Terry's coat pocket. *Id.* He then

dard³⁶ for the stop and frisk, balancing the government's interest in effective crime prevention and the safety of police officers against the individual's interest in personal security and privacy.³⁷

The stop and frisk is not subject to traditional probable cause analysis because it differs from the typical arrest situation.³⁸ *Terry* classifies the stop and frisk as a search and seizure within the fourth amendment,³⁹ however, rejecting the government's contention that a stop and frisk involves only a "minor inconvenience and petty indignity,"⁴⁰ and should not be subject to any fourth amendment analysis. The Court reasoned that if a stop and frisk did not fall under the rubric of the fourth amendment, the initial confrontation between the police and public would go unscrutinized by the Constitution, thereby eradicating certain limitations on police conduct necessary for the protection of individual rights.⁴¹

The individual has the right to be free from arbitrary, on-the-street

patted down the other two men, finding a revolver on one of them. *See id.* The Court noted that it was reasonable to assume the men were contemplating a robbery, which was likely to involve weapons, *id.* at 28, and also that the police officer acted correctly in patting them down first, and only searching further after he felt weapons. *Id.* at 29-30.

36. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968). To justify the invasion, the officer's suspicions must be based on specific, articulable facts. *Id.* at 21.

37. *See id.* at 20-21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)). The Court, in *Camara*, developed this balancing approach in determining the need for a warrant to conduct a regulatory housing inspection, weighing the government's interests in public health and safety against the individual's interest in privacy. *See* 387 U.S. at 530-34. It used the balancing approach to find a lower threshold of probable cause necessary for that warrant, *id.* at 538, concluding that probable cause existed if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.*

38. *See Dunaway v. New York*, 442 U.S. 200, 209 (1979); *Terry v. Ohio*, 392 U.S. 1, 16 (1968). A brief, on-the-street seizure differs from a custodial arrest in its duration, level of intrusion, and long-range results. *See* 3 W. LaFave, *supra* note 23, § 9.1(d), at 342.

39. *See* 392 U.S. at 19.

40. *Id.* at 10 (quoting *People v. Rivera*, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 36, 252 N.Y.S.2d 458, 464 (1964), *cert. denied*, 379 U.S. 978 (1965)). The Court stated that whenever a police officer limits a person's freedom to walk away, he has seized the person and that to refuse to acknowledge a pat-down as a search is "sheer torture of the English language." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

41. *See id.* at 17. The Court was concerned with police abuse of field interrogations, particularly with respect to minority groups, either to build up the power image of the police or to harass undesirables and drive them away. *See id.* at 13-15 & nn.9-11. Although the primary purpose of the exclusionary rule, *see Mapp v. Ohio*, 367 U.S. 643, 655 (1961), is to deter police misconduct, *see Weeks v. United States*, 232 U.S. 383, 391-93 (1914), the Court found that the rule inadequately safeguards the individual's personal security interest in this circumstance because it plays no part in deterring police violations of the fourth amendment when the police have no interest in procuring evidence for prosecution: when police instigate illegal encounters, they are not necessarily motivated by possible convictions of the individual. *See Terry*, 392 U.S. at 13-15 & nn.9-11. Therefore, excluding wrongfully obtained evidence at trial often does little to deter police misconduct in stop and frisk cases. *See Terry*, 392 U.S. at 13-14; 3 W. LaFave, *supra* note 23, § 9.1(e), at 347; Note, *The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee's Companion*, 62 Notre Dame L. Rev. 751, 753 & nn.19-21 (1987).

encounters with police,⁴² and, even if the stop is justified, *Terry* acknowledges that an individual has the right to be free from severe intrusions—frisks—upon his personal security.⁴³ The Court held, however, that these interests must be balanced against society's interest in effective crime prevention and in protecting police officers acting in furtherance of their duties.⁴⁴ The Court concluded that a stop and frisk is reasonable if it is based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."⁴⁵ The intrusion, however, must be strictly limited by the circumstances that justify its initiation:⁴⁶ the stop must result from the exercise of a legitimate investigative interest,⁴⁷ and the search must not go beyond a cursory pat-down for weapons unless a weapon is felt, in which case, the officer may remove it from the arrestee's person.⁴⁸

In *Terry* the Court professed, and subsequently has reiterated, its holding allowing protective weapons searches based on reasonable suspicion to be a narrow exception to the probable cause requirement.⁴⁹ It declined in *Terry* to develop comprehensive limitations on the reasonable suspicion standard,⁵⁰ instead calling specifically for case-by-case adjudi-

42. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

43. *See* 392 U.S. at 24-25.

44. *See id.* at 23-24; *accord* *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *Dunaway v. New York*, 442 U.S. 200, 209 (1979); *Adams v. Williams*, 407 U.S. 143, 146 (1972).

45. *Terry*, 392 U.S. at 21. The Court made it clear that suspicions based on "hunches" would not justify an intrusion. *Id.* at 27. For a discussion of the facts of *Terry*, *see supra* notes 34 & 35.

The mandate for factual justification runs throughout the Court's fourth amendment decisions. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (allowing *Terry* search of passenger compartment of vehicle if police can point to specific facts justifying reasonable belief); *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (mere presence on premises of authorized narcotics search without specific factors pointing to reasonable suspicion does not justify cursory search for weapons); *Adams v. Williams*, 407 U.S. 143, 146-48 (1972) (allowing *Terry* frisk based on reliable informant's tip if other facts point to reasonable suspicion that officer may be in danger); *Beck v. Ohio*, 379 U.S. 89, 96-97 (1964) (unsupported "reports" of criminal activity not enough to justify arrest for numbers running).

46. *See Terry v. Ohio*, 392 U.S. 1, 26 (1968).

47. *Terry*, 392 U.S. at 22.

48. *See id.* at 29-30; *supra* note 35; *see, e.g., Sibron v. New York*, 392 U.S. 40, 65 (1968) (police officer's search of suspect's pockets neither motivated by, nor limited to, safety precaution).

49. *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968). Later Supreme Court decisions also have indicated that *Terry* was meant to be a narrow exception to the probable cause requirement. *See, e.g., Florida v. Royer*, 460 U.S. 491, 499 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979); *Dunaway v. New York*, 442 U.S. 200, 210 (1979). There presently appears to be a propensity, however, for the Court to extend exceptions to the probable cause requirement to a wider variety of situations. *See, e.g., O'Connor v. Ortega*, 107 S. Ct. 1492, 1501-02 (1987) (plurality opinion) (work-related misconduct investigations); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (searches of schoolchildren); *see also United States v. Place*, 462 U.S. 696, 711-14 (1983) (Brennan, J., concurring in result) (criticizing Court's expansion of *Terry* exception).

50. 392 U.S. 1, 29 (1968).

cation of protective weapons searches by lower courts.⁵¹

II. PROTECTIVE WEAPONS SEARCH OF A COMPANION OF AN ARRESTEE

A. Automatic Companion Rule

The Supreme Court's refusal to elaborate on the reasonable suspicion exception has spawned conflicting interpretations of *Terry*.⁵² Several courts have attempted to apply the *Terry* standard to a protective search for weapons of an arrestee's companion.⁵³ In *United States v. Berryhill*,⁵⁴ the Court of Appeals for the Ninth Circuit established a bright-line rule that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subject to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed."⁵⁵ This "automatic companion" rule,

51. *Id.*; see, e.g., *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 499 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985).

52. See Comment, *Terry Revisited: Critical Update on Recent Stop-and-Frisk Developments*, 1977 Wis. L. Rev. 877, 879 [hereinafter, Comment, *Terry Revisited*]. Compare *United States v. Branch*, 545 F.2d 177, 186 (D.C. Cir. 1976) (*Terry* does not authorize searching shoulder bag) with *People v. Moore*, 32 N.Y.2d 67, 70-71, 295 N.E.2d 780, 783, 343 N.Y.S.2d 107, 111-12 (allows search of handbag), *cert. denied*, 414 U.S. 1011 (1973). Courts and commentators agree that *Terry* established a lesser standard than probable cause, but also criticize the decision for not providing clear direction. See Comment, *Fourth Amendment Rights of Persons Present When a Search Warrant is Executed: Ybarra v. Illinois*, 66 Iowa L. Rev. 453, 459 & n.45 (1981) [hereinafter Comment, *Ybarra v. Illinois*]; see, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 888-90 (1975) (Douglas, J., concurring) (criticizing *Terry*'s widespread application as "a weakening of the Fourth Amendment"); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394-95 (1974) (finding *Terry*'s reasonableness standard difficult to apply).

53. Compare *United States v. Simmons*, 567 F.2d 314, 319 (7th Cir. 1977) (citing automatic companion rule with approval) and *United States v. Poms*, 484 F.2d 919, 921-22 (4th Cir. 1973) (per curiam) (extending automatic companion rule) and *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971) (automatic companion rule) with *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986) (requiring examination of totality of the circumstances) and *United States v. Bell*, 762 F.2d 495, 500 (6th Cir.) (same), *cert. denied*, 474 U.S. 853 (1985) and *United States v. Tharpe*, 536 F.2d 1098, 1100-01 (5th Cir. 1976) (en banc) (examining totality of the circumstances), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987) and *United States v. Vigo*, 487 F.2d 295, 298 (2d Cir. 1973) (same).

54. 445 F.2d 1189 (9th Cir. 1971).

55. See *id.* at 1193; accord *United States v. Simmons*, 567 F.2d 314, 319 (7th Cir. 1977); see also *United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973) (per curiam) (extends automatic companion rule to companion who arrives during the arrest).

In *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971), the officers had a warrant for the defendant's arrest for a postal violation. They knew of his prior arrests and that he usually carried weapons. *Id.* at 1192. The officers stopped the defendant, with his wife, in his car at a busy intersection. *Id.* After they ordered him out of the car and searched him, they ostensibly searched his wife's purse for weapons. *Id.* The search did not uncover a weapon, but did produce evidence that was used to convict *Berryhill*. See *id.*

In *United States v. Vaughan*, 718 F.2d 332 (9th Cir. 1983), the Court of Appeals for the Ninth Circuit again followed the automatic companion rule set out in *Berryhill* but

on its face, does not require that the officer have any suspicion about the arrestee's companion,⁵⁶ nor has any court indicated that the rule requires as much.⁵⁷ The rule permits the arrestee's companion to be frisked solely on the basis of companionship.⁵⁸ The court in *Berryhill* reasoned that allowing such a limited intrusion on a categorical basis best serves *Terry*'s concerns with respect to police officer safety.⁵⁹

The Courts of Appeals for the Fifth, Sixth, and Eighth Circuits reject the automatic companion rule, adopting instead a totality-of-the-circumstances test.⁶⁰ These courts acknowledge the safety concerns aired by the Supreme Court in *Terry*,⁶¹ however, they focus more on the Court's call for specific, factual justification of a frisk based on reasonable suspicion,⁶² by requiring that a frisk of an arrestee's companion be based on specific, articulable facts known to the officer at the time of the search.⁶³ The circumstances examined by these courts to determine if reasonable suspi-

did not cite to the case. *Id.* at 334. The court held that "[d]espite the lack of probable cause to arrest Vaughan [the arrestee's companion], the police had a right to detain him briefly to . . . engage in a limited *Terry* 'stop and frisk' to determine that he had no weapons that might endanger the officers." *Id.* at 334.

For a selection of state cases that apply the automatic companion rule, see *supra* note 16.

56. See *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971).

57. See Note, *supra* note 41, at 751 n.10. See generally *United States v. Vaughan*, 718 F.2d 332, 335 (9th Cir. 1983); *United States v. Simmons*, 567 F.2d 314, 319 (7th Cir. 1977); *United States v. Poms*, 484 F.2d 919, 920-21 (4th Cir. 1973) (per curiam).

58. *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971); see Comment, *United States v. Bell: Rejecting Guilt by Association in Search and Seizure Cases*, 61 Notre Dame L. Rev. 258, 269 (1986).

59. *Berryhill*, 445 F.2d at 1193 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)); see Note, *supra* note 41, at 755; see also *United States v. Simmons*, 567 F.2d 314, 319 (7th Cir. 1977) (discussing potential dangers involved in custodial arrest); *United States v. Poms*, 484 F.2d 919, 921 (4th Cir. 1973) (per curiam) (discussing dangers of associates attempting to free the arrestee).

60. See *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 498 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); *United States v. Tharpe*, 536 F.2d 1098, 1100-01 (5th Cir. 1976) (en banc), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987); see also *United States v. Clay*, 640 F.2d 157, 162 (8th Cir. 1981) (refusing to extend *Terry* to permit a frisk based on less than reasonable belief simply because the person happened to arrive while a search warrant was being executed); *United States v. Cole*, 628 F.2d 897, 899 (5th Cir. 1980) (same), *cert. denied*, 450 U.S. 1043 (1981).

61. See *United States v. Flett*, 806 F.2d 823, 828 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 501-02 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); *United States v. Tharpe*, 536 F.2d 1098, 1100 (5th Cir. 1976) (en banc), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987).

62. See *Flett*, 806 F.2d at 827; *Bell*, 762 F.2d at 499-500; *Tharpe*, 536 F.2d at 1100. The reasonable suspicion standard does not require that the officer actually experience fear of potential harm, but merely that, based on sufficient facts, the officer reasonably believe that the person with whom he is dealing is armed and dangerous. *Accord Flett*, 806 F.2d at 828; see *Tharpe*, 536 F.2d at 1101.

63. See *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 500 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); *United States v. Tharpe*, 536 F.2d 1098, 1100 (5th Cir. 1976) (en banc), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987).

cion exists include companionship, but are not limited to it.⁶⁴

B. *The Automatic Companion Rule is Inconsistent with Reasonable Suspicion*

While the Supreme Court has never considered the constitutionality of the automatic companion rule,⁶⁵ its decisions in related areas indicate that the automatic companion rule conflicts with the fourth amendment's proscription against unreasonable searches and seizures because the rule permits a stop and frisk on less than reasonable suspicion.⁶⁶ Accordingly, pursuant to the fourth amendment, the Supreme Court requires that intrusions into personal security "must be based on specific, objective facts indicating that society's legitimate interests require [such intrusions]."⁶⁷

In *Ybarra v. Illinois*,⁶⁸ the Court, applying *Terry*, clearly held that the mere presence of an individual at a place subject to a search based on probable cause is insufficient to justify a *Terry* frisk and, thus, clearly rejected the notion of guilt by association.⁶⁹ The *Ybarra* Court refused to

64. See *Flett*, 806 F.2d at 827; *Bell*, 762 F.2d at 500-02; *Tharpe*, 536 F.2d at 1100. For example, in *Bell*, the court considered five factors: (1) that the arrestee was known to be potentially armed and dangerous; (2) that Bell was in the car with the arrestee; (3) that Bell could not be ruled out as the arrestee's accomplice of the week before; (4) that the car was parked in a relatively crowded place, with people milling around it; and (5) that Bell, while staring at the agent "defiantly," refused to comply with the agent's commands. 762 F.2d at 502.

In *Flett*, the court considered a different set of five factors: (1) that the arrest was for a narcotics violation; (2) that the arrestee, who had a prior gun charge, was the known enforcer of a gang; (3) that Flett's car was unfamiliar, bearing out-of-state license plates; (4) that Flett resembled known gang members; and (5) that Flett was in the arrestee's home. 806 F.2d at 827-28.

65. See *Flett*, 806 F.2d at 826.

66. See *infra* note 67 and accompanying text.

67. *Brown v. Texas*, 443 U.S. 47, 51 (1979) (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)); see, e.g., *Michigan v. Long*, 463 U.S. 1032, 1050-51 (1983) (search of passenger compartment of arrestee's car); *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (search for weapons of tavern patron); *Dunaway v. New York*, 442 U.S. 200, 212-13 (1979) (pre-arrest custodial interrogation); *Chimel v. California*, 395 U.S. 752, 763 (1969) (search incident to lawful arrest may not extend beyond room where arrest takes place); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (protective frisk for weapons); *United States v. DiRe*, 332 U.S. 581, 587 (1948) (mere presence in a suspected car insufficient to justify a personal search for contraband).

Although the Court has held that the fourth amendment does not absolutely require individualized suspicion, see *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (allowing routine border checkpoint stops), exceptions to the individualized suspicion requirement may be made only "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979) (citation omitted)). The automatic companion rule, however, impairs more than minimal privacy interests and other safeguards do not exist. See *infra* notes 119-23 and accompanying text.

68. 444 U.S. 85 (1979).

69. See *id.* at 93-94.

uphold the search of a bar patron conducted during a search of the bar and bartender pursuant to a warrant.⁷⁰ It held that the patron's search was based merely on the defendant's presence in the bar,⁷¹ and that probable cause did not exist to justify the intrusion on the defendant.⁷² Furthermore, the frisk also violated the *Terry* reasonableness standard because the police could provide no specific, articulable facts to justify a reasonable suspicion that the defendant was armed and dangerous.⁷³ The decision stressed that the narrow scope of *Terry* does not permit a frisk for weapons based on less than reasonable suspicion, even though the defendant happens to be present during the execution of a search warrant.⁷⁴ By repeating the *Terry* articulable reasonable suspicion standard in *Ybarra*,⁷⁵ the Court reflected its concern that unwarranted searches might otherwise become arbitrary or discriminatory.⁷⁶

Although the reasoning adopted by the Court of Appeals for the Ninth Circuit in *United States v. Berryhill*⁷⁷ relies on *Terry*,⁷⁸ the automatic companion rule in fact conflicts with the Court's analysis in *Terry*. A rule holding a companion automatically subject to a frisk cannot be reconciled with the Supreme Court's mandate in *Terry* and *Ybarra* that the police may conduct a pat-down for weapons only when they can provide specific, articulable facts indicating a reasonable suspicion that the individual to be frisked is armed and dangerous.⁷⁹ The automatic companion rule permits the search of any companion of an arrestee, requiring neither individualized suspicion as to the companion, nor an inquiry into the companion's physical ability to harm the police officer.⁸⁰ The dispos-

70. See *id.* at 96.

71. See *id.* at 94. While conducting a "cursory search for weapons" of all patrons, one of the officers felt a cigarette package in Ybarra's pocket, but did not extricate it. Several minutes later, the officer frisked Ybarra again, removed the cigarette package from his pocket, and discovered heroin inside. See *id.* at 88-89.

72. Neither the search warrant nor the defendant himself gave any indication that he or any of the other patrons of the bar were engaged in criminal conduct. *Id.* at 91-92. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91 (citing *Sibron v. New York*, 392 U.S. 40, 62-63 (1968)).

73. See *id.* at 93-94. Among the factors the Court considered were: (1) the sufficient lighting of the bar; (2) the fact that Ybarra was not a known criminal; (3) that his hands were empty; (4) that he made no threatening gestures; and (5) that he was not dressed unusually (for example, wearing a heavy coat in August). *Id.* at 93.

74. See *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979); accord *United States v. Thomas*, No. 86-1353, slip op. 4383, 4398 (9th Cir. filed April 14, 1988).

75. See *id.* at 93-94.

76. See Comment, *Ybarra v. Illinois*, *supra* note 52, at 463.

77. 445 F.2d 1189 (9th Cir. 1971).

78. See *id.* at 1193.

79. See *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 498-99 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (*en banc*), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987); 3 W. LaFave, *supra* note 23, § 9.4(a), at 509-12; Comment, *supra* note 58, at 269-70.

80. See *supra* notes 55-58 and accompanying text. Although the term "capable" of inflicting harm indicates the existence of some level of physical ability, see Webster's New

itive factor justifying the search is simply the companion's association with the arrestee,⁸¹ a direct contradiction of *Ybarra's* rejection of guilt by association.⁸²

According to the Court's mandate in *Terry*, courts must evaluate the totality of the circumstances leading to a search of an arrestee's companion to determine if specific, articulable facts exist justifying reasonable suspicion that the companion is armed and dangerous.⁸³ Although companionship certainly is a factor to be examined,⁸⁴ other circumstances, such as the nature of the arrestee's suspected violation, the conduct and demeanor of the companion, the time and place of the arrest, and the opportunity for the arrestee's companion to harm the officer must be considered.⁸⁵ Because the automatic companion rule does not require an examination of the totality of the circumstances,⁸⁶ the rule is an inappropriate extension of *Terry*.⁸⁷

Universal Unabridged Dictionary 267 (2d ed. 1983), courts applying the rule have not addressed this factor separately. See Note, *supra* note 41, at 751 n.10. See generally *United States v. Simmons*, 567 F.2d 314 (7th Cir. 1977); *United States v. Poms*, 484 F.2d 919 (4th Cir. 1973) (per curiam); *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971).

81. See *supra* notes 58, 80 and accompanying text.

82. See *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). The Court relied in part on *United States v. DiRe*, 332 U.S. 581 (1948) in which it held that it was "not convinced that a person, by mere presence . . . loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

83. See *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 499 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987); cf. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (requires examination of the circumstances to determine reasonable suspicion to stop and frisk suspect). See generally *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.").

84. See *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 500-02 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); *United States v. Tharpe*, 536 F.2d 1098, 1100-01 (5th Cir. 1976) (en banc), *overruled on other grounds*, 834 F.2d 1179 (5th Cir. 1987).

85. See *Flett*, 806 F.2d at 827-28; *Bell*, 762 F.2d at 500-02; *Tharpe*, 536 F.2d at 1100; *United States v. Vigo*, 487 F.2d 295, 298 (2d Cir. 1973). These considerations derive from various Supreme court cases. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 91-93 (1979) (looking to sufficient lighting of bar, anonymity of *Ybarra*, his conduct and demeanor in refusing to uphold the frisk); *Adams v. Williams*, 407 U.S. 143, 147-48 (1972) (considering time of day, report that person was armed, and disregard of request to get out of car in allowing the search); *Terry v. Ohio*, 392 U.S. 1, 28 (1968) (considering the number of people in the area, demeanor of the arrestees, and their refusal to cooperate with the officer); see also 3 W. LaFave, *supra* note 23, § 9.4(a), at 511 (relevant circumstances include the nature of the crime, the time and place of the arrest, the number of officers present, and the conduct of the companion); Comment, *Terry Revisited*, *supra* note 52, at 886-892 (factors to determine reasonable suspicion include appearance, conduct, criminal record, environment, police purpose, and source of information).

86. See generally *United States v. Simmons*, 567 F.2d 314 (7th Cir. 1977); *United States v. Poms*, 484 F.2d 919 (4th Cir. 1973) (per curiam); *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971).

87. See *United States v. Flett*, 806 F.2d 823, 827-28 (8th Cir. 1986); *United States v.*

C. *The Automatic Companion Rule is an Inappropriate
Bright-Line Rule*

An analysis of the totality of the circumstances to determine the propriety of a protective search for weapons of an arrestee's companion can be performed only on a case-by-case basis.⁸⁸ Because the circumstances of each case differ, bright-line rules pose the danger of becoming so arbitrary and confusing that they will offer no guidance to police officers conducting these searches.⁸⁹ Indeed, the Supreme Court in *Terry* clearly mandated a case-by-case application of its standard of reasonable suspicion to protective weapons searches.⁹⁰

The automatic companion rule is an inappropriate bright-line rule for several reasons. It fails to delineate clear and certain boundaries so that it may be applied without a case-by-case analysis.⁹¹ The rule does not define companionship, thereby producing inconsistent results in cases with similar facts.⁹²

Bell, 762 F.2d 495, 498 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985); Comment, *supra* note 58, at 270.

88. See Comment, *supra* note 58, at 270.

89. See Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 287 (1984). Professor Alschuler has suggested a whimsical but daunting picture of the future of the fourth amendment clouded by bright-line rules in the characterization of a 1990 police academy graduate:

Gazenga is a good officer. He has memorized all 437 Supreme Court bright-line rules for search and seizure. For example, Gazenga has made a lawful arrest in a car. Gazenga rip that car apart! But Gazenga never touch trunk of car unless there is probable cause, for Gazenga has read footnote 4 of Belton opinion. Now Gazenga has made a lawful arrest in a house. Different bright-line rule apply to a house. Gazenga may search glove compartment of car when suspect far away, but may not search desk drawer in living room unless suspect right there. Why? Supreme Court say so. Gazenga just a cop. Gazenga now has made lawful arrest in cabin cruiser. Oh no! Supreme Court forgot to give Gazenga bright-line rule for cabin cruiser! What is poor Gazenga to do?

Id. at 286 (footnote omitted).

90. See *Terry v. Ohio*, 392 U.S. 1, 29 (1968). Later cases support this reading. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979); *Dunaway v. New York*, 442 U.S. 200, 209 & n.11 (1979); *United States v. Robinson*, 414 U.S. 218, 249 (1973) (Marshall, J., dissenting); *Sibron v. New York*, 392 U.S. 40, 62-64 (1968); *United States v. Flett*, 806 F.2d 823, 827-28 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 499 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985). The Court has applied the *Terry* analysis to other search and seizure issues as well. See, e.g., *O'Connor v. Ortega*, 107 S. Ct. 1492, 1503 (1987) (work-related misconduct investigations); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (searches of schoolchildren).

91. This is one of the criteria Professor LaFave suggests to justify the creation of a bright-line rule. See LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 325-26 (1982). LaFave proposes several other requirements as well: the rule must produce results similar to those obtained through case-by-case analysis, see *infra* note 92 and accompanying text, the rule must respond to a genuine need to reject case-by-case application as unworkable, see *infra* note 93 and accompanying text, and the rule must not be subject to ready manipulation and abuse, see *infra* note 94 and accompanying text.

92. Compare *United States v. Poms*, 484 F.2d 919, 921-22 (4th Cir. 1973) (per curiam) (rule applies to person who arrives during arrest) with *United States v. Clay*, 640 F.2d 157, 162 (8th Cir. 1981) (rule inapplicable to person who arrives during arrest).

Furthermore, no genuine need to forego case-by-case analysis exists. Those cases applying the totality-of-the-circumstances approach arrive at consistent outcomes by examining specific factors that give rise to reasonable suspicion.⁹³ Last, the automatic companion rule is subject to manipulation and abuse because it may be the source of incriminating information against the companion, yet is not predicated on the appropriate justification of reasonable suspicion of bodily harm.⁹⁴ This may produce the unacceptable result of an unjustified frisk producing an arrest.⁹⁵

Admittedly, the Supreme Court has promulgated bright-line rules in a number of cases involving search and seizure issues; however, these situations do not resemble those to which the automatic companion rule is applied.⁹⁶ In some cases, the Court has justified a categorical approach because the government has an interest in maintaining police safety and in preventing destruction of evidence.⁹⁷ In other cases, the Court has justified a categorical intrusion because the police action involves a relatively minor inconvenience to the individual.⁹⁸ These interests, however, do not exist with respect to the automatic companion rule.

In *Chimel v. California*,⁹⁹ *United States v. Robinson*,¹⁰⁰ and *New York v. Belton*,¹⁰¹ the Supreme Court indicated that the government's interests in protecting the police officer's safety and preventing the destruction of evidence during a lawful custodial arrest so outweighed the arrestee's privacy interest that a bright-line rule was appropriate.¹⁰² These cases per-

Additionally, the rule itself does not define the capability requirement, nor has any subsequent court explained it. See *supra* note 80 and accompanying text.

93. See, e.g., *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 500-02 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985).

94. See *supra* notes 77-87 and accompanying text. The automatic companion rule represents an erosion of the fourth amendment safeguards "to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates." *United States v. Bell*, 762 F.2d 495, 499 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985).

95. Cf. *Sibron v. New York*, 392 U.S. 40, 63 (1968) ("an incident search may not precede an arrest and serve as part of its justification").

96. See *infra* notes 97-113.

97. See, e.g., *New York v. Belton*, 453 U.S. 454, 460 (1981) (passenger compartment of automobile may be searched incident to a lawful custodial arrest); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (search incident to a custodial arrest); *Chimel v. California*, 395 U.S. 752, 763 (1969) (search of "grab area" incident to an arrest).

98. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (detention of occupants of premises during valid search pursuant to a warrant founded on probable cause); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (*per curiam*) (detention of person outside of vehicle while officer issues traffic citation).

99. 395 U.S. 752 (1969).

100. 414 U.S. 218 (1973).

101. 453 U.S. 454 (1981).

102. See *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973); *Chimel v. California*, 395 U.S. 752, 763 (1969). Although these decisions involve custodial arrests and implicate an additional governmental interest beyond that justifying the automatic companion rule, even they have been criticized as going too far. See *Belton*, 453 U.S. at 470-71 (Brennan, J., dissenting); *Robinson*, 414 U.S. at 248 (Marshall, J., dissenting); Alschuler, *supra* note 89, at 259; LaFave, "Case-by-

mitted automatic searches—incident to a custodial arrest—of the arrestee,¹⁰³ his “grab area,”¹⁰⁴ and the passenger compartment of his car.¹⁰⁵

In *Pennsylvania v. Mims*¹⁰⁶ and *Michigan v. Summers*,¹⁰⁷ the Court adopted a categorical approach to de minimis detention cases because it found that the interests of the government outweighed the inconvenience to the individual.¹⁰⁸ In *Mims*, it upheld the brief detention of the driver of a car outside of his vehicle while a police officer issued him a traffic citation,¹⁰⁹ reasoning that detention involves only an incremental intrusion beyond an initial, justified stop.¹¹⁰ The Court balanced the “petty indignity”¹¹¹ suffered by the individual against the heightened danger to the police officer both in dealing with people in automobiles and in standing exposed to traffic.¹¹² In *Summers*, it held that probable cause for a search warrant implicitly justifies the detention of the occupants of the premises being searched,¹¹³ again balancing the strong government interests in safety against the minor intrusion to the individual.

The circumstances in which the courts of appeals apply the automatic companion rule differ significantly from those in which the Supreme Court has drawn bright-line rules. Of importance is the fact that *Chimel*, *Robinson*, and *Belton* draw bright-line rules with respect to arrestees,¹¹⁴ not arrestee’s companions. Moreover, the overriding concern in a case involving a protective frisk for weapons of the companion of an arrestee is the safety of the police officer.¹¹⁵

Although this concern clearly is significant, it, without more, does not

Case Adjudication” Versus “Standardized Procedures”: The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 150-60.

103. *Robinson*, 414 U.S. at 234.

104. *Chimel v. California*, 395 U.S. 752, 763 (1969). The grab area is the “area into which an arrestee might reach in order to grab a weapon or evidentiary items.” *Id.*

105. *New York v. Belton*, 453 U.S. 454, 460 (1981).

106. 434 U.S. 106 (1977).

107. 452 U.S. 692 (1981).

108. See *Michigan v. Summers*, 452 U.S. 692, 702-05 (1981); *Pennsylvania v. Mims*, 434 U.S. 106, 111 (1977) (per curiam).

109. *Mims*, 434 U.S. at 111. The Court noted that it was the order to get out of the car that constituted the intrusion. *Id.*

110. *Id.*

111. The Court noted that brief detention outside the vehicle did not rise to the level of intrusion of a *Terry* frisk, stating that it is not even a “petty indignity” much less a “serious intrusion upon the sanctity of the person.” *Id.*

112. *Pennsylvania v. Mims*, 434 U.S. 106, 110-11 (1977) (per curiam).

113. *Michigan v. Summers*, 452 U.S. 692, 705 (1981). The Court examined several factors: (1) that police had a warrant to search the defendant’s house, therefore, detention was only an incremental intrusion; (2) that detention is less intrusive than a search and is not apt to be exploited since it is not the potential source of information; (3) that detention in the home provides less public stigma than a custodial arrest culminating in a visit to the police station; and (4) that law enforcement has an interest in preventing defendant’s disappearance if evidence is found and in minimizing risk to officers (although no danger to the officers is indicated in the record). *Id.* at 701-03.

114. See *supra* notes 97-113 and accompanying text.

115. See *supra* note 59 and accompanying text; Note, *supra* note 41, at 762.

meet Supreme Court standards for justifying bright-line rules. *Chimel* and *Belton* also require an interest in preventing destruction of evidence.¹¹⁶ This interest does not justify the automatic companion rule because, as the court in *Berryhill* noted, police may not search a companion of an arrestee for evidence merely because he is present.¹¹⁷ The only interest behind the rule, therefore, is the protection of police officers from harm perpetrated by the arrestee's companion.¹¹⁸

Furthermore, the automatic companion rule goes beyond the de minimis intrusion caused by detention justified in *Mimms* and *Summers* to the severe intrusion caused by a personal frisk for weapons.¹¹⁹ In *Terry*, the Supreme Court stressed the sanctity of the person to be free from arbitrary intrusion,¹²⁰ and noted that a cursory frisk for weapons may inflict great indignity and arouse strong resentment.¹²¹ The automatic companion rule also presents a greater danger of misuse or exploitation than does mere detention because the protective search for weapons offers a potential source of incriminating evidence.¹²² The automatic companion rule, therefore, may be abused so as to legitimize an arrest that is not justified at its inception.¹²³

CONCLUSION

The automatic companion rule should not be utilized because it contradicts the requirement that fourth amendment seizures at least be based on reasonable suspicion. Because courts apply it without consideration of the circumstances in each case, the automatic companion rule permits unreasonable searches and seizures in violation of the fourth amendment. Requiring police officers to point to "specific and articulable facts"¹²⁴ that would cause the "reasonably prudent man in the circumstances [to]

116. See *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Robinson*, 414 U.S. 218, 234 (1973); *Chimel v. California*, 395 U.S. 752, 756 (1969).

117. *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971); see also *United States v. DiRe*, 332 U.S. 581, 587 (1948) (mere presence in suspected car does not justify personal search for evidence).

118. See *supra* notes 54-59 and accompanying text.

119. See *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986); *United States v. Bell*, 762 F.2d 495, 499 (6th Cir.), *cert. denied*, 474 U.S. 853 (1985).

120. *Terry v. Ohio*, 392 U.S. 1, 17 (1968); see *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

121. *Terry*, 392 U.S. at 17. The Court in *Terry* found the following to be an apt description of frisk procedure: "the officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." *Terry*, 392 U.S. at 17 n.13 (quoting *Priar & Martin, Searching and Disarming Criminals*, 45 J. Crim. L. Criminology & Police Sci. 481, 481 (1954)).

122. See *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). Compare *Michigan v. Summers*, 452 U.S. 692, 701 (1981) (detention is not the source of incriminating evidence) with *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971) (protective search for weapons may result in incriminating evidence).

123. See *supra* note 95 and accompanying text.

124. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

be warranted in the belief that his safety or that of others was in danger"¹²⁵ provides a workable test that more closely addresses the concerns raised in *Terry v. Ohio*.

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125. *Id.* at 27.